

1 NOSSAMAN LLP
2 THOMAS D. LONG, (SBN 105987)
3 tlong@nossaman.com
4 SCOTT N. YAMAGUCHI (SBN 157472)
5 syamaguchi@nossaman.com
6 DAVID GRAELER (SBN 197836)
7 dgraeler@nossaman.com
8 445 S. Figueroa Street, 31st Floor
9 Los Angeles, California 90071
10 Telephone: 213.612.7800

11 Attorneys for Plaintiff, INDYMAC MBS, Inc,
12 a Delaware corporation

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re

INDYMAC BANCORP, INC., a
Delaware corporation,

Debtor.

INDYMAC MBS, INC., a Delaware
corporation,

Plaintiff,

v.

ACE AMERICAN INSURANCE
COMPANY, et al.

Defendants.

Case Nos.: CV 11-02950-RGK
CV 11-02998-RGK

Adv. Proc. No.: 2:11-cv-02998-RGK

**PLAINTIFF'S OFFER OF PROOF IN
OPPOSITION TO MOTIONS OF
CERTAIN INSURERS TO DISMISS
PLAINTIFF'S COMPLAINT**

DATE: July 25, 2011 [off-calendar]
TIME: 9:00 a.m. [off-calendar]
DEPT: 850 (Judge Klausner)

1 In lieu of oral argument, plaintiff, IndyMac MBS, Inc. ("MBS") submits this
2 offer of proof of proposed amendments to its complaint, if this Court were to grant
3 (and it should NOT grant) any or all of the pending motions to dismiss by certain
4 of the insurer defendants. This proffer should be deemed unnecessary because
5 MBS' operative complaint is justiciable "as is" -- but even if any of the motions
6 are granted, MBS should be entitled to leave to amend and/or remand to State
7 Court.

8 MBS could amend its complaint in at least the following ways.

9 1. California Cause of Action. Only if absolutely necessary: eliminate
10 any claim for relief from the federal courts, to be replaced by a cause of action for
11 declaratory relief under California law, for adjudication upon remand to the State
12 Court -- free of Article III constraints on the federal judiciary -- pursuant to Code
13 of Civil Procedure section 1060, which expressly authorizes such an action
14 "before there has been any breach of the obligation in respect to which said
15 declaration is sought." The pending motions to dismiss are based in part on the
16 argument that there is no claim for declaratory relief until there is a failure to pay
17 insurance proceeds that are due. Even if this were an accurate analysis of
18 federal law (and it is not) it is not an accurate statement of California law.

19 2. Two New Underlying Lawsuits. Specifically allege a strong likelihood
20 of exhaustion from defense costs and potential liabilities in three existing lawsuits
21 and two new ones, very likely to exceed \$2.5 million in defense costs alone,
22 consisting of both attorney's fees and legal expenses, based on reasonable
23 projections and inferences about the probable "burn rate" to be explained in
24 further detail. This is based not only on the 3 underlying lawsuits naming MBS
25 as a defendant currently referenced in the complaint and the more than \$500,000
26 in defense costs incurred to date in early proceedings, but also the two additional
27 lawsuits that were recently filed against IndyMac MBS after the filing of the
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operative complaint which therefore does not mention these lawsuits. These two lawsuits are *National Credit Union Administration Board v. RBS Securities, Inc.*, case no. 2:11-cv-02340-RDR-KGS, filed on June 20, 2011, in the U.S. District Court for the District of Kansas ("NCUA 1") (Plaintiff's Request for Judicial Notice ["RJN"], Exh. A), and *National Credit Union Administration Board v. J.P. Morgan Securities LLC*, case no. 2:11-cv-02341-EFM-JPO, filed on June 20, 2011, in the U.S. District Court for the District of Kansas ("NCUA 2") (Plaintiff's Request for Judicial Notice, Exh. B). The NCUA 1 action appears to allege damages in connection with MBS mortgage securities of more than \$39 million (RJN, Exh. A, p. 39, bottom table at "month 12"), plus nearly \$8 million (RJN, Exh. A, p. 40, top table at month 12). The NCUA 2 action appears to allege damages of more than \$18 million (RJN, Exh. B, p. 37, top table, month 12).

3. Insurance Bad Faith Claim. Include an express cause of action for breach of the implied covenant of good faith and fair dealing, based on the insurers' current and ongoing failure to take reasonable steps to ensure the future availability of insurance proceeds for all of their insureds (including MBS), by some means of equitable apportionment that does not prejudice and discriminate against those insureds (especially MBS) whose coverage claims will allegedly not become ripe until some later time. The insurers' failure in this regard would be further explored in discovery.

DATED: July 20, 2011

NOSSAMAN LLP
THOMAS D. LONG
SCOTT N. YAMAGUCHI
DAVID GRAELER

By: /s/ SCOTT N. YAMAGUCHI
SCOTT N. YAMAGUCHI
Attorneys for Plaintiff, INDYMAC MBS, INC.,
a Delaware Corporation